No. 83-5053

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SALVATORE PETRELLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. May an alien charged with unlawful reentry after deportation in violation of 8 USC 1326 collaterally attack the underlying deportation order where that order has not been subject to judicial review?

2. Does the due process clause of the Constitution of the United States preclude an administrative agency from conclusively establishing an element of a criminal offense?

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals was rendered on May 11, 1983 by the Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, sitting by designation. The panel was also composed of Circuit Judges Lumbard and Cardamone. Their opinion is reported at No. 82-1342, slip op. at 3807 (2nd Cir. May 11, 1983) and is set forth in Appendix A.

The decision of the district court was rendered without written opinion on July 16, 1982, by the Honorable Albert W. Coffrin, United States District Judge for the District of Vermont. A transcript of Judge Coffrin's decision from the bench is included as Appendix B.

JURISDICTION

Judgment of the Court of Appeals was entered on May 11, 1983 affirming the decision of the District Court.

The jurisdiction of the Supreme Court is invoked by Petitioner's request for a Writ of Certiorari to review a decision of a Court of Appeals. 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Resolution of the issue raised by this Petition involves interpretation of the Immigration and Nationality Act of 1952, Section 276, codified at 8 USCA 1326:

> Any alien who--
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place ouside the United States or his applicationn for admission from foreign continguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both. June 27, 1952, c. 477, Title II, ch. 8, 276, 66 Stat. 229.

Because the question presented raises the broad issue of the use of a judicially unreviewed administrative determination as conclusive proof of an element of a criminal offense, resolution of the question also involves interpretation of the due process clause of the Fifth Amendment to the Constitution of these United States.

STATEMENT OF THE CASE

Mr. Petrella, the Defendant, was charged by two count indictment on June 3, 1982 with violation of 8 USC 911, making a false claim of American citizenship (Count I), and 8 USC 1326, attempting reentry after a prior deportation (Count II). Only the conviction on this latter count is the subject of the present petition.

Mr. Petrella presented himself for entry and was arrested at the border checkpoint at Highgate Springs, Vermont on May 23, 1982. He was indicted by a grand jury on June 3, 1982. Counsel was assigned for Mr. Petrella's benefit; an interpreter was appointed and present for all proceedings in the District Court. Mr. Petrella entered a plea of not guilty at arraignment on June 9, 1982. On July 13, 1982 Mr. Petrella filed a Motion to Dismiss Count II of the indictment. A hearing was held before District Judge Albert W. Coffrin on July 16, 1982. The District Court heard arguments and denied Mr. Petrella's Motion to Dismiss at the conclusion of the hearing.

Mr. Petrella proceeded to jury trial on July 21, 1982 on both counts of the indictment. On July 22, 1982 Mr. Petrella was found guilty on both counts. Mr. Petrella was sentenced to one year in prison; all but 30 days were suspended. He was placed on probation for two years following release from confinement.

Appeal to the Court of Appeals for the Second Circuit was taken from the the denial of Defendant's Motion to Dismiss. Both Mr. Petrella and the government submitted briefs and appeared at oral argument held on February 8, 1983. On May 11, 1983 the Court of Appeals affirmed the denial by the District Court of Defendant's Motion to Dismiss.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT HAS PREVIOUSLY RESERVED CONSIDERATION OF THE ISSUE RAISED BY THIS PETITION AND THE MATTER SHOULD NOW BE ADDRESSED

In United States v. Spector, 343 U.S. 169, 72 S.Ct. 591, 96 L.Ed. 863 (1952), the Supreme Court reserved decision on the issue raised by this petition: may an alien charged with violation of a criminal statute, one of the elements of which is a prior deportation order, collaterally attack the original deportation order in the criminal proceeding. 343 U.S. at 172-173. In Mr. Petrella's case that issue is squarely presented and after thirty-one years of uncertainty an answer is necessary. The uncertainty has spawned great differences in treatment by the federal circuits. Infra, p. 5.

In Spector the dissent strongly intimated that the majority believed that use of an administrative determination as conclusive proof of an element of a criminal offense was constitutionally defective. 343 U.S. at 180 (Jackson, J., dissenting). Justice Jackson's opinion, joined expressly by Justice Frankfurter and tacitly approved by Justice Black, 343 U.S. at 174 n. 2, forcefully argued that allowing an administrative tribunal to establish conclusively an element of a criminal offense unconstitutionally usurps the power of the jury. 343 U.S. at 175, 178-179. If the court were to allow an administrative proceeding to establish conclusively an element of a criminal offense, "the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom." 343 U.S. at 177-178 (Jackson, J., dissenting).

The question of whether an administrative agency charged with enforcing the law may conclusively determine an element of a criminal offense is sufficiently momentous to be addressed by this court.

II. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

The Courts of Appeals in the third, seventh, and ninth circuits permit collateral review of deportation orders. U.S. v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975); U.S. v. Bowles, 331 F.2d 742 (3rd Cir. 1964); U.S. v. Heikkinen, 221 F.2d 890 (7th Cir. 1955). The circuit courts of the fifth and tenth circuits do not permit collateral review. U.S. v. Gonzalez-Parra, 438 F.2d 694 (5th Cir. 1971); Arriaga-Ramirez v. U.S., 325 F.2d 857 (10th Cir. 1963). In his opinion below in this case Judge Zampano concludes that the eighth circuit has not squarely addressed the question, see United States v. Cabrera, 650 F.2d 942, 943 (8th Cir. 1981). U.S. v. Petrella, No. 82-1342, slip op. at 3810-3811. By its decision in this case, the second circuit has aligned itself with those barring collateral review.

The split in the federal circuits creates a wide discrepancy in treatment of an alien.

III. COLLATERAL ATTACK OF A CRIMINAL CONVICTION IS NOT ANALOGOUS TO COLLATERAL ATTACK OF AN AGENCY DETERMINATION

The Court of Appeals opinion asserts that an agency determination of deportability is analogous to a criminal conviction. U.S. v. Petrella, No. 82-1342, slip op. at 3811 n. 2. From this hypothesis the court concludes that, consistent with the decision of this Supreme Court in U.S. v. Lewis, 445 U.S. 55, 100 S.Ct. 915, 636 L.Ed. 2d 198 (1980), an alien who has been deported and whose deportation order has not been subject to judicial scrutiny is in the same position as an escapee from prison who seeks collateral review of his underlying conviction in defense of a charge of escape. See U.S. v. Cabrera 650 F.2d 942, 943 (8th Cir. 1981) (rehearing and rehearing en banc denied); U.S. v. Pereira, 574 F.2d 103, 106 n.6 (2nd Cir. 1978); U.S. v. Bruno, 328 F.Supp. 815, 825 (W.D. Mo. 1971).

There is a very apparent dichotomy between a criminal defendant who has been adjudged guilty of a crime with the panoply of constitutional protections and an alien against whom an administrative termination of deportability is made. In his dissent in Spector, supra, p. 4, Justice Jackson emphasized some important distinctions: in deportation proceedings the administrative officer is both judge and prosecutor, proof is by a preponderance of the evidence, the order is upheld if buttressed by substantial evidence, no statute of limitations may apply. Spector, 343 U.S. at 178-179. Other important rights in criminal proceedings, such as the right to assigned counsel, do not obtain in deportation proceedings.

This court has recognized that to deny collateral attack of an administrative determination in criminal proceedings "can be exceedingly harsh. The Defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order." McKart v. United States, 395 U.S. 185, 197, 89 S.Ct. 1653, 23 L.Ed.2d 194 (1969).

CONCLUSION

This court should grant this Petition for Writ of Certiorari and decide whether to permit collateral attack of an agency decision where the government seeks to use such a decision as conclusive proof of an element of a criminal offense.

Respectfully submitted,

Jeffrey B. Meller, Esq.

JBM/heidi
petrella.001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 798—August Term, 1982

(Argued February 8, 1983 Decided May 11, 1983)

Docket No. 82-1342

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SALVATORE PETRELLA,

Defendant-Appellant.

Before:

LUMBARD and CARDAMONE, *Circuit Judges,*
and ZAMPANO, *District Judge.**

Appeal from a judgment of conviction entered upon a jury verdict in the United States District Court for the

* Honorable Robert C. Zampano, United States District Judge for the District of Connecticut, sitting by designation.

District of Vermont, Coffrin, *Judge*, following the denial of appellant's motion to dismiss a charge of illegal reentry into the United States after deportation in violation of 8 U.S.C. § 1326.

Affirmed.

JEFFREY B. MELLER, ESQ., Burlington, Vermont, *for Defendant-Appellant*.

GEORGE W. F. COOK, United States Attorney, District of Vermont, George J. Terwilliger, III, Assistant U.S. Attorney, P. Scott McGee, Assistant U.S. Attorney, *for Plaintiff-Appellee*.

ZAMPANO, *District Judge*:

The sole issue raised on this appeal is whether a defendant, indicted under 8 U.S.C. § 1326 for unlawful reentry into this country after deportation, may challenge the validity of the original order of deportation as a defense to the prosecution. We conclude that the underlying deportation is not subject to collateral attack in a § 1326 criminal proceeding and we therefore affirm appellant's conviction.

I

Appellant, Salvatore Petrella, was admitted to the United States in 1978 as a visitor to inspect and study a

training program for machine tool operators in Billerica, Massachusetts. Petrella decided to enroll in the program and a one-year trainee visa was issued by the Immigration and Naturalization Service ("INS"). When the visa expired, he failed to depart voluntarily and a deportation warrant issued. With the aid of retained counsel, who represented him before the INS Petrella delayed his departure from the United States for an additional three years. Finally, a deportation order was issued, from which no appeal for judicial review was perfected. On April 19, 1982, Petrella was arrested and deported to Italy.

Approximately a month later, Petrella flew from Italy to Canada and unsuccessfully attempted to enter this country at Niagara Falls. Undaunted, he again attempted to cross the border at Highgate Springs, Vermont on May 23, 1982. In response to routine questions by Immigration Inspectors, Petrella stated he was an United States Citizen and produced a Social Security Card and a Massachusetts driver's license to support his claim. A search of his automobile yielded an Italian passport and, after further questioning, he was arrested and charged with willfully making a false claim of citizenship, 18 U.S.C. § 911, and with attempting to enter the United States without authorization after deportation, 8 U.S.C. § 1326.[1]

[1] Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

Prior to trial, Petrella moved to dismiss the indictment on the ground that the 1979 deportation proceedings did not comport with due process. The District Court refused to review the merits of the deportation and denied the motion. On July 21, 1982, a jury found appellant guilty on both charges.

II

In *United States v. Spector*, 343 U.S. 169, 172-73 (1952), the Supreme Court reserved decision on whether a defendant may relitigate the issue of original deportability in a criminal prosecution in which the prior deportation is an element of the offense. The courts of appeals that have addressed the question in the context of a § 1326 prosecution are divided as to whether collateral attacks are permissible.

The Third, Seventh and Ninth Circuits have approved varying degrees of trial court review of the underlying deportation. See, e.g., *United States v. Rosal-Aguilar*, 652 F.2d 721, 722-23 (7 Cir. 1981) (government must prove the deportation was "based on a valid legal predicate and obtained according to law"); *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9 Cir. 1980) (defendant entitled to demonstrate that a violation of an INS regulation prejudiced a protected interest); *United States v. Bowles*, 331 F.2d 742, 750 (3 Cir. 1964) (defendant permitted to show there was no factual or legal basis for his deportation).

The Eighth Circuit, while indicating that a limited pretrial review of the deportation hearing may be permissible in some circumstances, *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8 Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976), has not squarely addressed the ques-

tion. See *United States v. Cabrera*, 650 F.2d 942, 943 (8 Cir. 1981).

The Fifth Circuit, after careful analysis of the elaborate scheme of administrative and judicial review already available to an alien under other provisions of the Immigration and Nationality Act ("INA"), has determined that Congress intended to bar collateral attacks on deportation orders in § 1326 prosecutions. *United States v. De La Cruz-Sepulveda*, 665 F.2d 1129, 1131 (5 Cir. 1981); *United States v. Gonzalez-Parra*, 438 F.2d 694, 697 (5 Cir.), *cert. denied*, 402 U.S. 1010 (1971). The Tenth Circuit, in *Arriaga-Ramirez v. United States*, 325 F.2d 857, 859 (10 Cir. 1963), has also rejected collateral review but with little supporting analysis.

III

Our analysis begins with the language of the unlawful reentry statute which provides in relevant part: "Any alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be guilty of a felony . . . ." 8 U.S.C. § 1326. The lack of any express reference to the validity of the deportation or of the arrest indicates that the statute seeks to punish the unauthorized reentry of an alien previously deported, regardless of whether the deportation was "lawful."[2]

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2 We believe this situation is analogous to a charge under 18 U.S.C. § 751 for escape from imprisonment brought against a defendant serving a sentence which is claimed to be invalid. It has been uniformly held in the § 751 proceedings that a defendant may not contest the propriety of the underlying conviction. See *United States v. Pereira*, 574 F.2d 103, 106 n.6 (2 Cir.), *cert. denied*, 439 U.S. 847 (1978) and cases cited therein.

We next examine the relevant provisions of the INA relating to judicial review of deportation orders. There are three "sole and exclusive" avenues for judicial intervention available to an alien who has exhausted his administrative remedies under the immigration laws and has not yet departed the United States. 8 U.S.C. § 1105a. First, he may obtain civil judicial review of the rulings of the Board of Immigration Appeals in the federal courts of appeals if he petitions for review within six months of the date of the deportation order. 8 U.S.C. § 1105a(a). Second, if he is in custody pursuant to the deportation order, he is entitled to habeas corpus review. 8 U.S.C. § 1105a(a)(9). Third, in a criminal prosecution under 8 U.S.C. § 1252(d) (willful failure to depart) or under 8 U.S.C. § 1252(e) (violation of supervisory regulations), the defendant may obtain pretrial judicial review. 8 U.S.C. § 1105a(a)(6).

Thus, neither the statute on its face nor the statutory scheme for review of deportation orders authorizes a challenge to the original deportation. We conclude, therefore, that Congress intended to bar collateral attacks in § 1326 prosecutions.[3]

This conclusion is fortified by our discussion of the issue in question in *United States v. Pereira*, 574 F.2d 103 (2 Cir.), *cert. denied*, 439 U.S. 847 (1978). In that § 1326

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[3] We are also loathe to add a further avenue of attack on deportation orders, in view of the formidable administrative and judicial arsenal available to litigants seeking review of such orders. The unconscionable delays in the deportation process that can be accomplished through imaginative "use" of the immigration laws is demonstrated by several cases in this Circuit. See, e.g., *Lok v. INS*, 681 F.2d 107, 107 (2 Cir. 1982) (appellant lived in the United States for 23 years, eleven of them under deportation orders); *Pang Kiu Fung v. INS*, 663 F.2d 417, 418-19 (2 Cir. 1981) (appellant flouted immigration authorities for 13 years and deportation proceedings stretched across a period of over 8 years).

prosecution, the defendant had been convicted of three counts of burglary, two counts of theft, and one count of escape from imprisonment. He was ordered deported on several occasions, and had previously been convicted of an illegal reentry violation. We found the defendant's continuing and flagrant disregard of the immigration laws so egregious that we affirmed his conviction on the facts, expressly reserving decision on whether defendants in other situations could collaterally attack the underlying deportation on which a § 1326 prosecution is based. In doing so, however, we expressed the view that the statutory deportation procedures "may not envision judicial review of deportation orders in cases like that at bar," 574 F.2d at 105 n.4. See also *United States v. Espinoza-Soto*, 476 F. Supp. 364, 366 (E.D.N.Y. 1979), aff'd, 633 F.2d 207 (2 Cir. 1980); *United States v. Mohammed*, 372 F. Supp. 1048, 1049 (S.D.N.Y. 1973).

Apart from the question of whether the statutory scheme authorizes collateral attack, Petrella argues that an agency determination not subjected to judicial review may not, under the due process clause, conclusively establish an element of a criminal offense. He accordingly argues that he has a constitutional right to judicial review of the deportation order. We, however, agree with the Fifth Circuit's analysis in *United States v. Gonzalez-Parra*, 438 F.2d 694, 697-99 (5 Cir.), *cert. denied*, 402 U.S. 1010 (1971), wherein the court held that there is no constitutional right to collateral attack in a § 1326 prosecution. See *United States v. Pereira*, 574 F.2d at 106 n.7.

Accordingly, the appellant's conviction is affirmed.

APPENDIX B

In terms of our Motion to Dismiss, Your Honor, as the memoranda for both sides have pointed out, there is no concensus in our Circuit about the propriety of collateral attack on original deportation. The responsive memo by Mr. Terwilliger cites the case of Lewis v. United States. I would indicate to the Court that the underlying offense in that situation was a criminal offense, which has been tried to conclusion in a State criminal court. That is not the type of underlying proceedings which we seek to have reviewed now. What we seek to have reviewed is an administrative determination by the Immigration and Naturalization Service that has never been subject to official scrutiny either de novo, which is not what we are asking for . . . . .

THE COURT: Why not?

MR. MELLER: Excuse me?

THE COURT: Why not?

MR. MELLER: Why not?

THE COURT: Well, you say it was just a determination and no appeal was taken, no further steps were taken in connection with the deportation itself. Why wasn't that done?

MR. MELLER: What happened was, Your Honor, a complaint for appeal was filed by Mr. Petrella's attorney in Massachusetts with the Federal District Court. The attorney in Massachusetts was not an immigration practitioner and apparently did not realize that that appeal must be filed with the Circuit Court of Appeals. Filed the complaint with the District Court and the Court threw it out for lack of jurisdiction, and by that time he was already deported. So there was no appeal, and there was no opportunity to appeal. The statute specifically says once you have left the country you may not seek judicial review, so it was . . . . .

THE COURT: . . . . How did he leave the country, voluntary departure?

MR. MELLER: No. He was arrested and deported.

THE COURT: You mean he was physically placed on a plane?

MR. MELLER: Physically placed on a plane in New York. So the oversight there unfortunately was

his attorney in Massachusetts, and I don't believe that Mr. Petrella ought to pay the penalty for the oversight of that attorney.

THE COURT: Is the remedy of collateral attack something that the Court has to decide prior to the trial anyway, or is it something that could be raised during the course of trial? Why do you think the indictment should be dismissed

MR. MELLER: I think the Indictment should be dismissed to save the Court its own time. If, in fact, the Court reviewed , does accept jurisdiction of the collateral attack and reviews the file and finds the re-entry was insufficient, that will dispose of one of the elements of the underlying charge and the Court won't have to hear any evidence on that.

THE COURT: You are thinking of saving the Court work; is that right?

MR. MELLER: Exactly. In the alternative, Your Honor, if the Court does not feel that it wants to entertain a collateral attack on the underlying deportation, we would ask the Court for a stay of the re-entry proceedings and we will somehow arrange, and I am unfortunately assigned counsel and I can't do it, we will arrange for appeal. The jurisdiction time of six months has not run on that original Order, which was filed in April. We will somehow arrange for an appeal to the First Circuit Court of Appeals

in Massachusetts. We are willing to waive any speedy trial requirements while that appeal is pending, and then we can follow the course that perhaps this proceeding should have taken, if counsel in Massachusetts had followdd the prescribed format.

THE COURT: Can't you do that anyway?

MR. MELLER: Excuse me?

THE COURT: Not you perhaps, but can't the defendant take an appeal anyway, regardless of what the Court decides here?

MR. MELLER: Yes, he can, Your Honor. But again, in terms of judicial economy, we would be trying a case next week on a re-entry, on several charges including re-entry, and the First Circuit Court of Appeals then overturns the original deportation Order, we would have tried him on an offense, and then have to go on Appeal on this case to overturn whatever, if we have a conviction out of this case, then have to appeal that to the Second Circuit and bring in the determination of the First Circuit that the original deportation was unlawful. I just think that is going to involve one additional judicial proceeding.

I think the most efficient way is the way the defendant has proposed, Your Honor: For this Court to review the original deportation Order. That way we have everything consolidated right here now.

Unfortunately we are using the time of this Court but are not involving the First Circuit Court of Appeals and the Second Circuit Court of Appeals. I guess that is about all I have, Your Honor.

MR. TERWILLIGER: Your Honor, in terms of the Discovery Motion, we submit to the Court that the case law is clear, that the type of statement that is in question here, the statements that are in question here, the statements of the witness, Mr. Aamodt, as opposed to statements of the defendant, the rule is clear; they don't have to be turned over. I don't think the government is being unnecessarily technical about this. The rules, until they are changed, they are the benchmarks upon which we all proceed.

In terms of what Mr. Meller termed the purpose of the discovery, the substance of those statements, andas I represented in the Motion, in fact the verbiage to a ninety-five percent degree which was used by Mr. Aamodt in his report, has been provided to the defense in the discovery letter, that is, his report of May 2.

In terms of the Motion to Suppress, Your Honor, I apologize to the Court to what extent my anger may have showed through, and I realize there are different minds on this question, but for one I guess it makes me rather angry to view what I would term a completely sham proceeding

in which a defendant takes the stand, and completely subverts the process by simply not telling the truth, the way this defendant did. I think it was not only obvious from his demeanor, I think it was obvious from his answers to the question that he was not telling the truth. I think that this defendant has a great deal of difficulty in not telling the truth, and that is what produced, when asked very specific questions on cross examination, his professed lack of memory.

In order for the Court to conclude that he did not knowingly understand what his rights were at the time, and make a knowing waiver of the same, the Court would have to conclude that those witnesses who testified for the government were not telling the truth. The only other witness called by the defendant I think actually supports the government's case. While Italian may be the primary language spoken at this particular operation, he did indicate that the defendant was able to converse at time without an interpreter with an English speaking employee, and that his English went from zero to something in the three and a half years he was there. I think it stands to reason, if somebody spends three and a half years in the United States, they are going to have to pick up some English.

On top of that, the point of him having received his warnings on at least one prior occasion in Italian,

was not so much that he knew what his rights were - obviously that wouldn't suffice through the situation - but he understood what was going on when those rights were read to him.

There is absolutely nothing in the record to contradict Mr. Aamodt's testimony concerning his asking the defendant to explain back to him what each of these rights were singularly as they went along, since the defendant professes a lack of memory on that particular point. We would submit that evidence stands unimpeached.

The other point that was raised in the defendant's motion, that is that he was subjectively in custody at the point he was referred for secondary inspection and, therefore, a warning should have been issued at that point, was contradicted by the defendant's own testimony when he said he felt he was free to leave up until - through that point, rather.

In terms of the Motion to Dismiss, I don't agree with Mr. Muller's statement that both sides feel there is no concensus in this Circuit. I don't know how the Second Circuit, without actually ruling on the issue, could have made their position clearer than they did in footnote six in the Perarra decision. I think it is clear when they say "We agree with the Court in Bruno" and then quote the Bruno Court as holding that not liable to collateral attack, that that's what they mean. Moreover, if the Court

is not satisfied that that is the position of the Second Circuit, we would urge the Court to adopt that position on two basis. The first being that the statutory scheme for the review of a deportation Order makes that particular scheme, that is §1101(A) the sole and exclusive remedy for deportation, for a deportee to seek remedy on a deportation order, and without some other claim of jurisdiction, some exception to that in the statute. We submit that Congress has made its intent clear, that a District Court in this situation would lack jurisdiction.

Secondly, Your Honor, we would submit to the Court that it is somewhat disingenuous to claim that the defendant was arrested and deported and it's his lawyer's fault over there because he was deported before this could take place. The defendant had from September to December of 1981 to voluntarily leave the country. He was ordered deported, and they told him you can leave, and he didn't leave, and it wasn't until April of 1982 that they caught up with him again, and then deported him on seven days notice. Obviously he had ample opportunity to seek the assistance of counsel and have that decision reviewed in that period after September of 1981 and didn't do so.

Finally, on the Motion to Dismiss, Your Honor, I don't think it is plain to the Court that hearing this collateral attack as an adjunct to this criminal case is

not going to save the Court any work. It would probably take longer to do that than it would to try the case, and I just don't think it even makes good sense for a Court sitting in a jurisdiction where an alien happens to attempt to re-enter the United States, to expend its resources to hear something that occurred in a District in a Circuit away. I realize that the Ninth Circuit has taken a contrary position, and we urge the Court that that position is not the best advised of the alternatives available.

THE COURT: Well, assuming for arguments sake that the Court was to agree with the Ninth Circuit, do you agree that the proper way to go about this would be to have a hearing prior to trial, or do you think that it is something that perhaps could be established during the course of trial?

MR. TERWILLIGER: Your Honor, I would think that some sort of a pretrial hearing would be almost a necessity to sort out the record, and what would be admissible evidence and what wouldn't. It is really a mixed question of law and fact, in a way. The only hook, if you will, jurisdictional hook I can see the Court having in it, would be on a Rule 29 Motion for Judgment of Acquittal, and I guess that that would subsume the notion that we would have to get to the point in the trial where the Motion would

be appropriate, Clearly I think it is plain that it is not the proper subject of a motion to dismiss, based on what the government could or could not prove. On the other hand, it is not necessarily something that would require a jury finding in that . . . . .

THE COURT: . . . No, but the Court could make a finding in the course of a jury trial.

MR. TERWILLIGER: That is correct, Your Honor. I guess what I am saying there is we could spend a lot of time proving a prior deportation was in pursuance of law, and I think that is a very important point, by the way, that that is, in fact, the element, and then have the Court say that as a matter of law it was not, and that would be the end of the case. And unfortunately we would spend all that time dealing with the jury before that. So I guess in that respect the Court could decide it pretrial as a practical matter. Perhaps some District Courts in the Ninth Circuit have ideas how to proceed.

THE COURT: Well, I am not quite sure how they did proceed in the Ninth Circuit. I was just curious.

MR. TERWILLIGER: I was just able to glean it from the cases.

THE COURT: My interest was more or less academic because I don't happen to agree with the Ninth Circuit, and that being the case, I am going to deny the Motion to Dismiss.

MR. TERWILLIGER: Thank you, Your Honor.

THE COURT: For the reasons discussed here this afternoon, and for the reasons as they appear in the government's brief, and for whatever examination I have made of the cases, it seems to me logical that the deportation proceeding should not be collaterally attacked in the criminal proceedings. So the Motion to Dismiss is denied.

SUPREME COURT OF THE UNITED STATES

SALVATORE PETRELLA Petitioner	)	
v.	)	No. 83-5053
UNITED STATES OF AMERICA Respondent	)	

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, Salvatore Petrella, through his attorney, Jeffrey B. Meller, Esq., respectfully requests the court to allow him to proceed in forma pauperis:

1. Counsel for Mr. Petrella was appointed under the Criminal Justice Act of 1964 in both the District Court and Second Circuit Court of Appeals.

2. Mr. Petrella remains indigent at this time.

DATED at Burlington, Vermont this 11 day of July, 1983.

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petrella.002

No. 83-5053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SALVATORE PETRELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may challenge the validity of a deportation order as a defense to a prosecution for unlawfully reentering the country.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5053

SALVATORE PETRELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3807-A3813) is reported at 707 F.2d 64.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1983. The petition for a writ of certiorari was filed on July 14, 1983, and is accordingly out-of-time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Vermont, petitioner was convicted of illegally reentering the United States after deportation, in violation of 8 U.S.C. 1326. He was sentenced to one year of imprisonment, all but 30 days of which was suspended, and was placed on probation for a period of two years to commence after his release from confinement. The court of appeals affirmed (Pet. App. A3807-A3813).

1. The essential facts are related in the opinion of the court of appeals (Pet. App. A3808-A3809). Petitioner was admitted to the United States in 1978 as a visitor to inspect and study a training program for machine tool operators in Billerica, Massachusetts. After he decided to enroll in the program, the Immigration and Naturalization Service (INS) granted him a one-year trainee visa. When the visa expired, petitioner failed to depart voluntarily and a deportation warrant issued. With the aid of retained counsel, who represented him before the INS, petitioner delayed his departure from the United States for an additional three years. Finally, the Board of Immigration Appeals issued a deportation order, from which petitioner did not appeal. On April 19, 1982, petitioner was arrested and deported to Italy.

Approximately a month later, petitioner flew from Italy to Canada and unsuccessfully attempted to enter the United States at Niagara Falls. On May 23, 1982, he again attempted to cross the border at Highgate Springs, Vermont. In response to routine questions by immigration inspectors, petitioner stated that he was a United States citizen and produced a social security card and a Massachusetts drivers' license to support his claim. A search of his automobile yielded an Italian passport. After further questioning, petitioner was arrested.

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that he was denied due process at his deportation proceeding. The district court refused to review the merits of the deportation order and denied the motion.

On appeal, petitioner again attacked the validity of his original deportation order as a defense to his prosecution under 8 U.S.C. 1326. The court of appeals, like the district court, rejected petitioner's submission. The court of appeals noted that a conviction under 8 U.S.C. 1326 does not depend upon the underlying validity of the prior deportation; "the statute seeks to punish the unauthorized reentry of an alien previously

deported, regardless of whether the deportation was 'lawful'" (Pet. App. A3811).

The court also noted that petitioner's asserted right to collateral review of his prior deportation was contrary to "the relevant provisions of the [Immigration and Naturalization Act] relating to judicial review of deportation orders" (Pet. App. A3812). Under the Act, there are three "sole and exclusive" (8 U.S.C. 1105a(a)) avenues for judicial review of an administrative deportation order. First, an alien may obtain judicial review of the rulings of the Board of Immigration Appeals in the federal courts of appeals if he petitions for review within six months of the deportation order. 8 U.S.C. 1105a(a). Second, if the alien is in custody pursuant to the deportation order, he may seek habeas corpus review. 8 U.S.C. 1105a(a)(9). Finally, an alien may obtain pretrial judicial review of a deportation order in a criminal prosecution for failing to depart (8 U.S.C. 1252(d)) or for violating supervisory regulations (8 U.S.C. 1252(e)). 8 U.S.C. 1105a(a)(6). Because "neither [8 U.S.C. 1326] on its face nor the statutory scheme for review of deportation orders authorizes a challenge to the original deportation," the court concluded "that Congress intended to bar collateral attacks in §1326 prosecutions" (Pet. App. A3812).

ARGUMENT

Petitioner contends that the courts below erred in refusing to allow him to challenge the validity of his original order of deportation as a defense to his prosecution for unlawfully reentering the country after he was deported. Petitioner's claim is without merit.

Section 1326 provides in pertinent part that "[a]ny alien who - (1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States * * * shall be guilty of a felony * * *." Because no modifier restricts the scope of the

term "deported," nothing on the face of the statute suggests a congressional intent to limit its coverage to persons whose deportation was lawful. Rather, the plain meaning of this sweeping statutory language is that unauthorized reentry following deportation is unlawful, regardless of the legal validity of the deportation.

This Court's reasoning in Lewis v. United States, 445 U.S. 55 (1980), is highly relevant to the proper construction of 8 U.S.C. 1326. In Lewis the issue was whether a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution under 18 U.S.C. 1202(a)(1), which bars firearms possession by any person who "has been convicted by a court of the United States or of a State * * * of a felony." The Court concluded that the underlying validity of the prior conviction was irrelevant to a prosecution under 18 U.S.C. 1202(a)(1). In the absence of any modifier limiting the scope of the word "convicted," the Court refused to read into the statute any requirement that the conviction be lawfully obtained (445 U.S. at 60). Likewise, a prosecution under 8 U.S.C. 1326 does not hinge upon the prior deportation order's soundness.

The plain language of 8 U.S.C. 1326, moreover, is not the sole support for the court of appeals' decision in this case. Congress' careful enumeration in 8 U.S.C. 1105a of the "sole and exclusive" avenues for judicial review of administrative deportation orders also refutes petitioner's claim. Nothing in that section remotely suggests that the original order of deportation may be challenged in a prosecution under Section 1326. To the contrary, Section 1105(a)(C) expressly provides that an order of deportation may not be reviewed by any court where the alien has left the country after the issuance of the order. Congress' intent to bar collateral attack on deportation orders in Section 1326 prosecutions is further evidenced by the fact that Section 1105(a)(6) expressly permits collateral attack

of deportation orders in prosecutions for failing to depart the country (8 U.S.C. 1252(d)) and for violating supervisory regulations (8 U.S.C. 1253(e)). Had Congress intended to authorize collateral attack of deportation orders in Section 1326 prosecutions it would certainly have said so.

Petitioner, however, does not really argue that Congress intended to permit collateral attacks of deportation orders in prosecutions under Section 1326. Rather, it appears to be petitioner's primary submission that he has a constitutional right to such collateral review. But this argument too is refuted by Lewis v. United States, supra. After holding that Congress, by means of 18 U.S.C. 1202(a)(1), intended to prohibit a felon from possessing a firearm despite the fact that the predicate felony conviction may have been unconstitutionally obtained, the court went on to rule that Congress could, consistent with due process, "focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons" (445 U.S. at 67). Likewise, in the present context, Congress may constitutionally bar previously deported aliens from reentering the country without permission, regardless of possible objections that may be raised as to the original deportation. Under a contrary rule, any alien who erroneously believed that his deportation was improper would be encouraged to reenter the country without authorization, and effective enforcement of the immigration laws would be seriously impeded. Cf. United States v. Pereira, 574 F.2d 103, 105 n.4, 106 n.6 (2d Cir.), cert. denied, 439 U.S. 847 (1978) (defendant may not contest the propriety of a prior deportation order in a prosecution under 8 U.S.C. 1326 where defendant had continuously and flagrantly disregarded the immigration laws).

Petitioner attempts to distinguish Lewis on the ground that the predicate event in that case was a criminal conviction rather than an administrative order of deportation. He asserts that this factual distinction is dispositive because "important rights

in criminal proceedings * * * do not obtain in deportation proceedings" (Pet. 6). If the reliability of the deportation determination were at issue under Section 1326, petitioner's argument conceivably might have merit. But, as we have shown, Congress has made the reliability of that determination irrelevant to the statutory scheme and Lewis indicates that it could constitutionally do so. Petitioner, moreover, has not been denied review of his deportation order -- he simply refused to invoke such review. Cf. Yakus v. United States, 321 U.S. 414, 444 (1944) ("no principle of law or provision of the Constitution * * * precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity"). Petitioner's due process argument, therefore, is unpersuasive.

Petitioner cites United States v. Heikkinen, 221 F.2d 890 (7th Cir. 1955); United States v. Bowles, 331 F.2d 742 (3d Cir. 1964), and United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975), to support his argument that the validity of a prior deportation order may be reviewed in a prosecution under 8 U.S.C. 1326. Any possible disparity between these cases and the decision below, however, does not warrant the attention of this Court.

In United States v. Rosal-Aguilar, 672 F.2d 721, 722-723 (1981), the Seventh Circuit retreated from the position taken in Heikkinen and expressly held that a defendant "is not constitutionally entitled to relitigate the merits of the deportation in a subsequent Section 1326 prosecution." _/ Accord, United States v. De La Cruz-Sepulveda, 665 F.2d 1129,

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_/ Heikkinen, moreover, involved a prosecution under the statutory forerunner to 8 U.S.C. 1252(e), and Congress has since provided for limited collateral review in Section 1252(e) cases. 8 U.S.C. 1105a(a)(6). But, as we have noted, Congress has not authorized collateral review of deportation orders in prosecutions under Section 1326.

1131 (5th Cir. 1981); United States v. Pereira, supra; United States v. Gonzalez-Parra, 438 F.2d 694, 697 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); Arriaga-Ramirez v. United States, 325 F.2d 857, 859 (10th Cir. 1963). In United States v. Bowles, supra, 331 F.2d at 750, the court held that an order of deportation may be collaterally attacked in a criminal proceeding on two "limited grounds" -- that "there is no basis in fact for the Board's conclusion in respect to deportability" and that "there is no warrant in law for * * * issuance [of the deportation order]." Because petitioner does not raise either of these grounds as the basis for his collateral attack, Bowles does not aid his cause.

The sole support for petitioner's argument, therefore, is the position taken by the Ninth Circuit in United States v. Gasca-Kraft, supra. But the Ninth Circuit adheres to this position solely on the basis of stare decisis (United States v. Barraza-Leon, 575 F.2d 218, 220 (1978)), and the circuit has not had the opportunity to reconsider the issue in light of this Court's decision in Lewis v. United States, supra. See United States v. Ranzel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529, 530 (9th Cir. 1979). Until the Ninth Circuit has had that opportunity, we do not believe that the possible conflict engendered by its decisions warrants this Court's review. _/

_/ Prior to this Court's decision in Lewis, the Ninth Circuit permitted collateral attack on felony convictions in a prosecution under 18 U.S.C. 1202(a)(1) in much the same manner as it currently permits collateral review of deportation proceedings in a Section 1326 prosecution. See 445 U.S. at 58 n.4. Because of the close similarity of petitioner's claims to the arguments rejected in Lewis, this Court's decision in Lewis might well bring the Ninth Circuit in line with the position taken by the other courts of appeals regarding the scope of a prosecution under 8 U.S.C. 1326.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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